United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2510

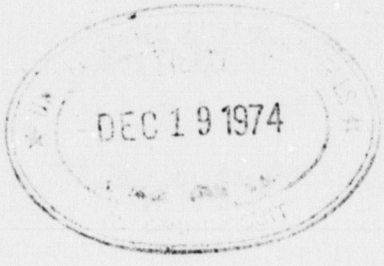
To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANGEL ISAAC, Relator-Appellant, -against- UNITED STATES OF AMERICA, Respondent-Appellee.	Docket No. 74-2510

BRIEF FOR
RELATOR-APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether it was error to deny a motion for a new trial without a hearing.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is taken from an order of the United States District Court for the Southern District of New York (The Honorable Thomas P. Griesa) entered on April 3, 1974, denying without a hearing a motion for a new trial.

A notice of appeal from that order was filed on April 9, 1974. Subsequently, relator-appellant filed a pro se motion in this Court seeking leave to appeal in forma pauperis and assignment of counsel.

By order dated November 19, 1974, this Court granted leave to appeal in forma pauperis, and The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was charged with conspiring with Herberto Prosper to distribute cocaine, with possession on August 2, 1972, of .30 grams of cocaine with intent to distribute that cocaine, and of aiding and abetting Prosper's possession of cocaine on September 14, 1972 (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 841(b)(1)(B); 18 U.S.C. §2). Appellant was found guilty after a jury trial, and on September 11, 1972, was sentenced to four

years' imprisonment on each count, the terms to run concurrently, to be followed by a five-year term of special parole.

At the trial, the Government's case was presented through the testimony of undercover agent Robert Joura and surveillance agents George Whelan, Lewis Perry, and Richard Klein. Appellant presented character witnesses and evidence that he did not participate in the narcotics dealings. In rebuttal, the Government called co-defendant Heriberto Prosper, who had pleaded guilty earlier, to testify that appellant had indeed been involved.*

On January 4, 1974, this Court affirmed the judgment. Thereafter appellant filed a motion for a new trial. Supporting the motion was an affidavit of appellant in which he attested to a conversation with Prosper in the beginning of January 1974 in which Prosper stated that appellant was not involved in the crime and that the reason Prosper had testified against appellant was that Federal authorities threatened to deport his wife and children and that Federal agents beat him and stole a sum of money from his person.

This same information was reported in an affidavit of John Denizard, Jr., who was also present at the conversation.

A third supporting document was a letter from Edward Montavo who reported a conversation with Prosper while the two of them were at the Federal House of Detention at West Street.

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*The evidence will be summarized infra.

According to Montavo, in that conversation Prosper stated that he had been told that he and his wife would receive long prison terms if he didn't do as the agents instructed and that was why Prosper framed appellant.

In an affidavit prepared by counsel, counsel stated he possessed a tape recording of a conversation between Prosper and appellant. Counsel stated that although the tape was in Spanish, he had been informed that Prosper referred to Government pressures which affected his testimony. Counsel also stated he had been informed that Prosper had given inconsistent testimony in another case.

In opposition to the motion, the Assistant United States Attorney filed an affidavit stating he had no knowledge of threats to Prosper; that the decision not to prosecute Prosper's wife was made long in advance of any agreement by Prosper to cooperate and that the sole Government committment to Prosper was to inform the Court of the nature and extent of the cooperation.

Attached to the Assistant United States Attorney's affidavit was an affidavit of Heriberto Prosper. Prosper stated that he considered the testimony he had given at trial to be the truth and that, if called to testify again, he would testify the same way. Prosper also stated that he

had coincidentally met appellant and Denizard on the subway and that when appellant asked Prosper to help him, Prosper replied that he could not do anything since he had told the truth. Prosper related that appellant had telephoned his home several times and had come to his home on two occasions. On the first, Prosper refused to change his testimony; on the second visit, Prosper asked appellant to leave. Prosper denied telling Montavo that he, Prosper, had testified falsely due to Government pressure.

On April 3, 1974, Judge Griesa held a conference on the motion. At the conference counsel explained that the tape mentioned in his affidavit was in Spanish, and that because he was assigned counsel, he was required to have authorization to pay for transcription of the tape (Minutes at 6). Counsel represented that he had been advised that the tape would show that Prosper admitted lying at the appellant's trial.

Judge Griesa, referring to Prosper's affidavit, stated that he believed that anything that Prosper said was coerced by the appellant. In support of this conclusion, the Judge stated:

> " I saw Mr. Isaac at the trial. This is a vigorous and rather imposing and could be a rather threatening fellow. He plainly lied on the stand, no question about it.

> " . . . So I have grave suspicions, to say the least, about any conversations he has under these circumstances with Prosper. And I think to me it is a dangerous situation for Isaac to be approaching Prosper under these circumstances. It is just bad."
> (Minutes at 8.)

Although the Judge continued to consider methods of transcribing the tape (Minutes at 9), the Government argued that it was unnecessary because the tape would be difficult to hear, that Prosper was only a rebuttal witness, that Prosper was in fear of his personal safety, and that Prosper himself did not swear to the recantation.

Judge Griesa, willing to assume that in the recorded conversation Prosper admitted lying, concluded that Prosper's affidavit stating he was in fear of Isaac rendered anything recorded on the tape meaningless (Minutes at 12). The Judge also indicated his belief that Isaac should have prepared an affidavit relating the facts about the visit to Prosper's home (Minutes at 12).

Relying on United States v. Troche, 213 F.2d 401 (2d Cir. 1954), the Judge denied the motion without a hearing. He found there was no recantation, even in the alleged statements to appellant and Montavo. He also concluded that if Prosper did make a statement, including any statement taken on the tape (Minutes at 20), the circumstances of the

interviews were so suspect as to render the statements meaningless (Minutes at 17). The Judge found that Prosper was telling the truth at trial and that his testimony was corroborated, and that, although his testimony had an effect on the jury, it was not part of the Government's direct case. By way of contrast, he said he thought appellant had testified falsely at trial (Minutes at 19).

ARGUMENT

IT WAS ERROR TO DENY THE MOTION FOR A NEW TRIAL WITHOUT A HEARING.

The standard for granting a hearing is whether the facts alleged, if taken as true, would entitle the petitioner to a new trial. Procunier v. Atchley, 400 U.S. 446 (1971); Taylor v. United States, 487 F.2d 307(2d. Cir. 1973). In those instances in which the request for a new trial is premised on recantation of testimony which is perjured due to Government misconduct, the standard for granting a new trial is whether without the use of the prejured testimony the jury might have reached a different conclusion. United States v. Sposato, 446 F.2d 779 (2d Cir. 1971); United States v. Polisi, 416 F.2d 573 (2d Cir. 1969); Larrison v. United States, 24 F.2d 82, 87 (1928); see United States v. De Sapio, 435 F. 2d 272, 286 (2d Cir. 1970).

In this case, the judge did not apply that standard when denying the motion. Instead, he concluded that the appellant and others who filed papers supporting the motion were lying and that Prosper was telling the truth. However, this determination of credibility is irrelevant to the threshold issue of whether to grant a hearing. Although the district judge relied upon United States v. Troche, 213 F.2d 401 (2d Cir. 1954), as authority for denial of the hearing he misapplies that decision. It relates only to whether the new trial should be granted; it does not apply to decision concerning the need for a hearing. Indeed where there are issues of credibility a hearing is necessary so that, as here, appellant and his counsel can cross-examine the witness to test the very crediblity that is challenged. Here, the Judge's belief that appellant coerced Prosper into recanting his testimony was, on the papers before the court, a hotly contested issue and one which could properly be resolved only after a hearing.

Not only were there affidavits presented by the appellant in support of his petition, but a tape was presented as well. According to what was, in essence, an offer of proof by counsel,* this tape was made at a meeting with Prosper

* The tape was in Spanish, but never translated. The Judge was willing to assume it showed that Prosper admitted giving false testimony at trial.

at his home and was a record of Prosper's admissions. This tape was properly admissible in evidence as proof of the appellant's allegations just as a tape may be used as proof of guilt (See e.g. United States v. Bryant, 480 F.2d 785 (2d Cir.(1973))). Under these circumstances, there was evidence of perjury which was properly admissible at a hearing, in addition to the affidavits accompanying the motion. Dalli v. United States, 491 F.2d 758, 760 (2d Cir. 1974)). Indeed, if Prosper recanted as the tape was expected to show, then Prosper's affidavit that he did not recant was itself false. If the judge believed that the conversation recorded on the tape took place in coercive circumstances this was a matter to be explored at a hearing, but which could not be resolved on the papers alone.

Now applying the appropriate standard for determining whether a hearing should be granted, a review of the record of the trial demonstrates that without Prosper's testimony, the verdict might have been different. The Government's case was presented through a Government undercover agent, Joura, who testified that on August 2, 1972, he met appellant through an informant and that appellant gave him a cocaine sample. Joura also testified that appellant named Prosper as his supplier. Joura further testified that on September 13th, appellant had available for

sale a large amount of cocaine but that he, Joura, did not buy the drug because the price was too high. According to Joura, appellant told the agent to talk to Prosper about the price (14-15).* Later dealings were with Prosper alone (20-21).

Appellant testified in his own behalf. He related a history of service in the armed forces, of duties connected with law enforcement (199-200), of attempts to secure education (203), and of efforts to assist his community (206,208).* He explained that a neighborhood acquaintance named Gill, while accompanied by Joura, asked where to find Eddie(Prosper) to buy drugs. Appellant replied he did not know, and that Eddie (Prosper) had been chased from appellant's store several times (211). Appellant asked Gill to leave the store or stop talking about drugs (217).

Prosper was called as a rebuttal witness. He testified that appellant asked him if he knew anyone dealing in cocaine (296). Prosper contacted a Cuban friend and made arrangements for delivery of a sample (298-9). Prosper acknowledged getting the cocaine for the second unconsumated transaction as well (301-3) and of selling on the next day half of the amount that was involved to the agent (306).

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* Character witnesses including a state senator were called to attest to appellant's good reputation in the community.

The Judge himself stated that he could not find that Prosper's testimony was without effect on the jury. More than that, however, the jury might have concluded that appellant was a militant reformer functioning in the midst of a community where drugs were generally available but that he was determined to stay clear of them. However, when another member of the community testified to appellant's participation in drug dealings and in fact, made appellant appear to be a significant person in the operation, the thrust of the defense was undermined. On these facts, the jury might well have arrived at a different verdict without Prosper's testimony. Accordingly, the appellant made a showing legally sufficient to require a hearing.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE ORDER BELOW SHOULD BE REVERSED AND THE CASE REMANDED FOR A HEARING.

Respectfully submitted,

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Of Counsel

December 19, 1974

Certificate of Service

Dec 19, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Phyllis Skloot Bamberger